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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFONSO CABRERA,

Defendant and Appellant.

B169745

(Los Angeles County
Super. Ct. No. VA065080)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Raul A. Sahagun, Judge. Affirmed.

Dennis P. O'Connell for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Supervising Deputy Attorney General, and Douglas L. Wilson, Deputy Attorney General, for Plaintiff and Respondent.

Alfonso Cabrera was convicted of one count of the attempted murder of a police officer, and three counts of assaulting a police officer, with true findings on allegations that he had used a firearm in the commission of all four crimes. (Pen. Code, §§ 664, 187, subd. (a), 245, subd. (d)(2), 12022.53, subd. (b).) He was sentenced to state prison for life with the possibility of parole plus 15 years, 8 months. Cabrera appeals, claiming he was not told he had a right to testify over his lawyer's objection, and contending trial counsel was ineffective. We reject these claims of error and affirm the judgment.

FACTS

A.

Cabrera was in a car driven by Erick Velasquez when Officer Richard Maretti stopped the vehicle for running a red light. While Officer Maretti questioned Velasquez, another patrol car arrived at the scene. Officer George Aguiar joined Officer Maretti and they directed Cabrera to get out of the car. Cabrera complied but started arguing with and backing away from Officer Aguiar, contrary to the officer's instructions. Then Cabrera pulled a gun, pointed it at Officer Aguiar's face, and threatened to kill the officer. Robert Esnayra (a reserve officer applicant riding with Officer Maretti) yelled to the officers that Cabrera had a gun. Cabrera pulled the trigger but the gun jammed, and Officer Aguiar grabbed his arm. Officers David Lopez (who had arrived with Officer Aguiar) and Maretti joined the struggle between Cabrera and Officer Aguiar for control of the gun. Cabrera stopped fighting when Officer Maretti fired a shot at him (but missed). Cabrera was handcuffed and searched, and a loaded gun was found on his person.

B.

At trial, all of the police officers (Aguilar, Lopez, Maretti, and Esnayra) and one civilian witness (Leonel Olmos) testified that Cabrera had a gun in his hand and was struggling over the gun with Officer Aguilar before the other officers joined the fray, and Officer Aguilar and Olmos testified that Cabrera had threatened to kill Officer Aguilar.¹ Two other civilian witnesses were called by the People -- Maizol Deleon, who had at the scene said she saw Cabrera with a gun but who at trial said she did not see any such thing, and Gerardo Martinez, who saw the struggle but did not see a gun in Cabrera's hand.

Cabrera was convicted as charged.

C.

At trial, Cabrera was represented by Deputy Public Defender Kathy Mendez. After the verdict but before sentencing, Cabrera discharged Mendez and retained Dennis P. O'Connell, who filed a motion for a new trial in which Cabrera claimed (1) that Mendez had never told him that he had a right to testify, and (2) that Mendez should have called character witnesses to show he was known for his "kindness." The motion was supported by a declaration from O'Connell, who said Cabrera told him that he did not testify because Mendez told him not to take the stand; had he testified, he would have explained that Mendez never visited him at County Jail (all of her visits were in the holding area at the courthouse), that Velasquez handed the gun to Cabrera when the police

¹ On the day of the crimes, Velasquez (in a taped interview) told the police that he had seen Cabrera pull a gun out of his pocket as he got out of the car, and that he saw him point it at the officer's head. Velasquez's testimony at trial was that he wasn't sure what he saw in Cabrera's hand. The tape of his earlier statement was played for the jury.

stopped the car, that the officers patted him down the minute he got out of the car, found the gun and threw him to the ground, then shot at him.

The trial court heard testimony from Cabrera at the hearing on the new trial motion, at which time Cabrera said he had told Mendez he wanted to testify but she recommended against it because some of the civilian witnesses' statements were inconsistent with the officers' statements, and he also complained that she did not discuss the case with him in sufficient detail. Mendez also testified, and explained that she had met with Cabrera several times, and had on several occasions advised him about his right to testify at trial. *He told her that he had committed the charged offenses, and she advised him against testifying.*

The trial court denied the motion, expressly rejected Cabrera's testimony, found Cabrera was fully informed about the case, and found the decision not to testify was his.

DISCUSSION

I.

We reject Cabrera's contention that he was not fully advised of his right to testify. First, the trial court did not believe him, and that credibility call is binding on this appeal. (*In re Wright* (1978) 78 Cal.App.3d 788, 801; *People v. Wallin* (1981) 124 Cal.App.3d 479, 483.) Second, Mendez's testimony that Cabrera admitted his guilt to her is uncontroverted, and that fact alone justifies her recommendation to him to stay off the stand. But even assuming Mendez should have said more to Cabrera about testifying, and assuming that he would in fact have testified (which he would have had to do without guidance from

counsel who certainly could not participate in his perjury), it is not reasonably probable that the jury would have reached a different conclusion.

All of the officers and most of the civilian witnesses, including Cabrera's buddy, Velasquez, told the same story (and there is civilian corroboration for Cabrera's threat to kill Officer Aguiar), and it is simply inconceivable that Cabrera's perjured testimony would have persuaded the jurors to reject all of that testimony in favor of Cabrera's self-serving tale. (*Strickland v. Washington* (1984) 466 U.S. 668, 689; *People v. Guzman* (1988) 45 Cal.3d 915, 943, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *Norton v. Hines* (1975) 49 Cal.App.3d 917, 922.)

II.

We summarily reject Cabrera's contention that Mendez should have called one more civilian witness (who did not see the gun) plus additional witnesses to testify about Cabrera's great "kindness." Aside from the fact that none of this could possibly have made a difference (Part I, *ante*), it was a small gun (making it mainly irrelevant that some of the witnesses didn't see it), and the fact that Cabrera might be viewed by some as a kind person has nothing at all to do with the manner in which he reacted when stopped by the police while carrying a loaded gun.

DISPOSITION

The judgment is affirmed.

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VOGEL, J.

We concur:

MALLANO, Acting P.J.

SUZUKAWA, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.